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Supreme Court of the United States

OCTOBER TERM, 1947.

In the Matter of

JAMES M. GORDON, *Petitioner.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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INDEX.

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Constitutional provisions and statute involved	2
Statement	2
A. History of the litigation	2
B. The invalidity under the Fourteenth Amendment of petitioner's imprisonment	5
C. Action of the courts to date	6
Manner in which federal questions were raised	7
Specifications of errors to be urged	7
Reasons for granting the writ of certiorari	8
Conclusion	13
Appendix	14
California constitutional provisions	14
Statute—California Penal Code, Section 1237	15

CITATIONS.

Cases:

Barbier v. *Connolly*, 113 U.S. 27, 31	11
Boykin v. *Huff*, 121 F. (2d) 865, 872 (App. D.C.)	11
Cochran v. *Kansas*, 316 U.S. 255	8, 11, 12, 13
Cole v. *Arkansas*, U. S. Supreme Court, March 8, 1948, 16 U.S. Law Week 4215, 4216	11
Ex Parte Sharp, 33 Fed. Supp. 464 (D.C. Kansas)	12
Gordon v. *Scudder*, 163 F. (2d) 518 (C.C.A. 9th)	4, 7
Gordon v. *Scudder*, No. 411, October Term, 1947, cert. denied November 24, 1947, 68 Sup. Ct. 208	3, 4, 7
In re De La Roi, 28 Cal. (2d) 264, 169 P. (2d) 363	5
In re Oliver, U. S. Supreme Court, March 8, 1948, 16 U. S. Law Week 4240, 4244	12

Page

People v. *Gordon*, 71 Cal. App. (2d) 606, 163 P. (2d) 110 3
Soon Hing v. *Crowley*, 113 U.S. 703, 708 11
State v. *Guerringer*, 265 Mo. 408, 416-417, 178 S.W. 65, 67 12
Sunday Lake Iron Co. v. *Wakefield*, 247 U. S. 350, 352 11
Utah Power & Light Co. v. *Pfost*, 286 U. S. 165, 190.. 11
Waley v. *Johnston*, 316 U. S. 101, 105..... 5
Williams v. *Kaiser*, 323 U. S. 471, 473, 477..... 5
Wuest v. *Wuest*, 53 Cal. App. (2d) 339, 345, 127 P. (2d) 934, 936..... 8, 12
Yick Wo v. *Hopkins*, 118 U. S. 356, 374..... 11

CONSTITUTIONAL PROVISIONS AND STATUTE:

California Constitution, Art. VI, Sec. 4..... 8, 14
California Constitution, Art. VI, Sec. 4b..... 8, 14
California Penal Code, Sec. 1237..... 8, 15

MISCELLANEOUS:

Brief for Petitioner in *Cochran* v. *Kansas*, 316 U. S. 255 11
California Jurisprudence, Vol. 13, p. 285..... 5
Record in Gordon v. *Scudder*, No. 411, October Term, 1947, cert. denied November 24, 1947, 68 Sup. Ct. 208 .....3, 4, 5, 7
Respondent's brief opposing certiorari in *Gordon* v. *Scudder*, No. 411, October Term, 1947, cert. denied November 24, 1947, 68 Sup. Ct. 208..... 4

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OPINION BELOW

No opinion was written below, the Supreme Court of California having entered only an order (R. last page), not reported, denying petitioner's petition for writ of habeas corpus.

JURISDICTION

The judgment of the Supreme Court of California was entered January 26, 1948 (R. last page). Jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment are denied in a criminal case

(a) When a state provides for an absolute right of appeal to an intermediate appellate court, but pro-

vides for appeal to the highest state court only when the highest court orders that the case be transferred to it, and

(b) The highest court uniformly follows the rule that it will not go behind the statement of facts contained in the opinion of the intermediate court if such opinion contains a correct statement of law based upon the facts related therein, and

(c) The intermediate court in its opinion makes palpable and patent misstatements of the facts appearing in the record, thereby precluding possibility of correction by the highest court and denying to petitioner the substance of review accorded generally by the state.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The California constitutional provisions and statute involved are set forth in the Appendix, *infra*, pp. 14-15.

STATEMENT

A. History of the Litigation.

Petitioner and Harry White were indicted on March 14, 1944, by the Los Angeles County Grand Jury and accused in Count One of conspiracy to cheat and defraud by criminal means, and to obtain money and property by false pretenses and by false promises with fraudulent intent not to perform such promises, and to commit grand theft. In Counts Two to Eight inclusive they were accused of the substantive offenses of grand theft. They were found guilty on all counts. White was placed on probation but petitioner, under the name of "James Margolis" was sentenced to imprisonment in the state prison "for the term prescribed by law." The sentences on Counts Two to

Eight inclusive were ordered to run concurrently but consecutively to the sentence on Count One [1] (R. 1-2).

Petitioner appealed to the California District Court of Appeal, which affirmed the conviction on all counts (R. 2; *People* v. *Gordon*, 71 Cal. App. (2d) 606, 163 P. (2d) 110). A rehearing was denied. Petitioner then petitioned the Supreme Court of California for a hearing which was also denied (R. 2) although two justices voted that a hearing be granted (R. No. 411, p. 5).[2]

Petitioner in the California district court of appeal moved to recall its remittitur, alleging among other reasons that the court in affirming the judgments of conviction did so under a mistake and misapprehension of the actual facts contained in the trial record (R. 2). This motion was summarily denied on the day it came on for hearing, without permitting petitioner to discuss the specifications of misstatement of facts, with the general statement that it is "the policy of the law to put an end to litigation even though a mistake may have been made" (R. 2; R. No. 411, p. 6). Petitioner thereupon applied for a hearing in the Supreme Court of California to review the order denying recall of the remittitur, but the Supreme Court denied a hearing on this application without opinion (R. 2).

Petitioner filed a petition dated August 6, 1946, in the Supreme Court of California for a writ of habeas corpus

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[1] The theory of the indictment and prosecution was that certain unimproved parcels of land in the San Joaquin Valley were sold by the use of false pretenses and false promises, the alleged false pretense being a representation that the land was potential oil land. The land was authorized to be sold as potential oil land by the Real Estate Commissioner of California, who issued a permit allowing such sales to the general public (R. 5).

[2] To facilitate explicit and comprehensive statement of the facts, in a few instances herein the record filed in this Court in *Gordon* v. *Scudder*, No. 411, October Term, 1947, cert. denied November 24, 1947, 68 Sup. Ct. 208, is referred to, the designation in such instances being "R. No. 411".

which denied the petition on August 19, 1946, *without rendering an opinion or in any way indicating the basis for its denial* (R. 4; the petition denied August 19, 1946, appears in R. No. 411, pp. 31-52).

Petitioner filed a petition for habeas corpus in the United States District Court, Southern District of California, dated December 5, 1946. An order to show cause was issued. On March 4, 1947, the district court entered an order discharging the order to show cause and denying the petition for habeas corpus. The respondent was not required to answer to the merits of the petition and the district court made no findings thereon. Pursuant to certificate of probable cause for appeal to the circuit court of appeals, such an appeal was taken and the circuit court of appeals affirmed the order of the district court solely on the ground that petitioner had not exhausted his state remedies because he had not petitioned this Court for certiorari following denial of habeas corpus by the California Supreme Court, *Gordon* v. *Scudder,* 163 F. (2d) 518, (C.C.A. 9th), thus refusing to examine into the merits. This Court on November 24, 1947, denied certiorari, *Gordon* v. *Scudder,* No. 411, October Term, 1947, 68 Sup. Ct. 208.[3]

Petitioner thereafter filed his second petition for habeas corpus, dated January 13, 1948, in the Supreme Court of California (R. 2-22), which petition was denied on January 26, 1948, *again without rendering an opinion or in any way indicating the basis for its denial* (R. last page).[4]

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[3] The facts stated in this paragraph do not appear in the instant record but do appear in the record in *Gordon* v. *Scudder,* No. 411, October Term, 1947, at pp. 2-30, 87, 88--97, 106, 109-110, 121-125.

[4] There is no claim in this case that any state remedy other than habeas corpus was available, or that the Supreme Court of California was not the appropriate state forum. The court in *Gordon* v. *Scudder,* 163 F. (2d) 518 (C. C. A. 9th), cert. denied 68 Sup. Ct. 208, as well as respondent's brief opposing certiorari, No. 411, October Term, 1947, assume that habeas corpus in the California

B. The Invalidity Under the Fourteenth Amendment of Petitioner's Imprisonment.

Petitioner's petition for habeas corpus in this proceeding (R. 5-13, 15-19, 23-33, 49-54), as well as his previous applications (R. No. 411, pp. 8-14, 19-26, 35-41, 46-48), states prejudicial denial to him of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment, resulting from discriminatory denial of appeal, which vitiates the convictions on all eight counts.[5]

In respect of Counts Two to Eight inclusive, the petition states that petitioner was denied the right of appeal accorded generally by the Constitution and laws of California in that the California District Court of Appeal (i) as respects Counts Two to Five inclusive, applied to petitioner evidence expressly excluded as to him (R. 5-7, 29-30),

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Supreme Court is the correct remedy. Cf. *Williams* v. *Kaiser*, 323 U. S. 471, 473, 477. Likewise the propriety of the second application to the California Supreme Court for habeas corpus is clear, the first one also having been denied without opinion or any indication of the basis of denial (R. 4). The first application may have been denied because on August 19, 1946, the date of such denial, the Adult Authority had not yet fixed the length of sentence on either Count One, or Counts Two to Eight, and that therefore a determination that the conviction on any count was valid, precluded inquiry at such time respecting the other counts (R. 2-4). In any event, in California, see 13 California Jurisprudence, p. 285, as generally, see *Waley* v. *Johnston*, 316 U. S. 101, 105, principles of *res judicata* do not apply in habeas corpus. Cf. *In re De La Roi*, 28 Cal. (2d) 264, 169 P. (2d) 363.

[5] No hearing having yet been had on the facts alleged in the petition for habeas corpus, such facts must of course be taken as true. But over and above this presumption, it is to be remembered that the facts alleged would here be proved not by self-serving testimony of questionable reliability or accuracy, but by the *written words of the trial transcript* as measured against the *written opinion* of the California District Court of Appeal.

(ii) as respects Counts Six and Seven, assumed testimony not in the record (R. 7-8, 30-31), and (iii) as respects Count Eight, stated that testimony was given by one person when in fact it was given by another, and misstated that certain testimony was corroborated when in fact it was not (R. 9-10, 31-32). The petition alleges that these misstatements deprived petitioner of the benefit of favorable rules of California and Federal Constitutional law,[6] the opportunity of obtaining the California Supreme Court's consideration of review, and accorded petitioner merely the form and not the substance of the right of appeal guaranteed him by the California Constitution and laws (R. 7, 8, 10-11, 16, 23-24, 29-33, 49-54).

The petition states that the conviction on Count One is likewise void because of denial of the right of appeal, in that the only transactions upon which such conviction could be predicated are the seven transactions involved in the seven counts vitiated for the reasons stated in the preceding paragraph (R. 11-13, 23-24, 32-33) and also because, by virtue of misstatement of facts by the district court of appeal, petitioner was precluded from showing that the California indictment and pre-trial proceedings, considered in their totality, denied him due process and equal protection in failing to inform him of the basis of the conspiracy count and in denying him opportunity of preparing his defense (R. 15-19, 23-24, 49-54).

C. Action of the Courts to Date.

The Supreme Court of California has thus twice denied habeas corpus *without rendering an opinion or in any way indicating the basis of its denial.* The United States district court and circuit court of appeals refused to consider the merits of petitioner's claim on the ground that petitioner had not exhausted his state remedies because he had

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[6] That these favorable rules were of vital and probably controlling importance to petitioner, see *infra*, p. 12.

not sought certiorari of this Court following denial of habeas corpus by the California Supreme Court on August 19, 1946, even though the latter court had not indicated the reason for its denial. *Gordon* v. *Scudder*, 163 F. (2d) 518 (C.C.A. 9th), cert. denied November 24, 1947, 68 Sup. Ct. 208. Thus, after approximately twenty months of litigation in an attempt by habeas corpus to secure determination of his rights under the United States Constitution, petitioner is before this Court following the California Supreme Court's second denial of habeas corpus *without opinion* (R. 4; last page).

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

Petitioner's claim that he has been denied his right of appeal in violation of the due process of law and equal protection of the laws guaranteed by the Fourteenth Amendment is expressly and specifically raised in the instant petition for habeas corpus and argued in detail in the accompanying Points and Authorities (R. 4, 15-16, 23-28), as it was in the first petition to the California Supreme Court and the petition to the United States district court (R. 4; R. No. 411, pp. 2, 6-7, 32-33).

SPECIFICATIONS OF ERRORS TO BE URGED

The Supreme Court of California erred:

1. In denying petitioner's petition for writ of habeas corpus.

2. In failing to hold that the allegations of petitioner's petition for writ of habeas corpus, if true, require petitioner's discharge.

3. In failing to order that a hearing be had to determine whether the allegations of petitioner's petition for writ of habeas corpus are true.

4. In denying petitioner's petition for writ of habeas corpus without rendering an opinion or in any way indi-

cating the basis of its denial, or stating its conclusions in respect of petitioner's federal claims.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

THE CALIFORNIA SUPREME COURT HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE NOT THERETOFORE DETERMINED BY THIS COURT AND HAS DECIDED IT IN A WAY NOT IN ACCORD WITH APPLICABLE PRINCIPLES OF FEDERAL CONSTITUTIONAL LAW.

The question raised by this petition has not been decided by this Court. It is an important question of Federal Constitutional Law. The decision below is not in accord with applicable principles of Federal Constitutional Law, as enunciated by this Court.

The right of appeal is an integral part of the legal process of California (R. 24-25). In *Wuest* v. *Wuest*, 53 Cal. App. (2d) 339, 345, 127 P. (2d) 934, 936, it was said:

> "The right of appeal is as sacred and inviolable as the right to a trial, and when by judicial oppression such right is violated or vitiated, the guaranteed and substantial rights of a party have been materially affected thereby."

Petitioner under the California Constitution and laws had the absolute right of appeal to the district court of appeal, California Constitution, Article VI, Section 4b; California Penal Code, Section 1237; Appendix, *infra*, pp. 14-15, and the right to a hearing in the Supreme Court in the event that his case was "ordered by the Supreme Court to be transferred to itself for hearing and decision", California Constitution, Article VI, Section 4; Appendix, *infra*, p. 14.

California discriminatively has denied the substance of the right of appeal to petitioner, in violation of the due process of law and the equal protection of the laws. Because California's discrimination has been effected more subtly than that appearing, for example, in *Cochran* v.

Kansas, 316 U.S. 255, it is necessary to perceive precisely the factual basis of such discrimination.

It is the invariable rule of the California appellate process that the Supreme Court will not go behind the statement of facts in an opinion of a district court of appeal if the opinion contains a correct statement of the law based upon the facts stated therein (R. 10-11). Thus, if a district court of appeal misstates the facts appearing in the record, but applies correct principles of law to the facts as misstated, a hearing in the Supreme Court is precluded. Here, the district court of appeal made palpable and patent misstatements of the facts appearing in the trial record. As respects Counts Two to Five inclusive, the district court of appeal said that certain evidence, admitted in support of these counts, had been admitted against petitioner, whereas in fact it had been admitted only against defendant White and had been expressly excluded as to petitioner (R. 5-7, 29-30). As respects Counts Six and Seven, the district court of appeal stated that the record contained evidence which in fact it did not (R. 7-8, 30-31). As respects Count Eight, the district court of appeal stated that testimony was given by one person when in fact it was given by another, and stated that certain testimony was corroborated when in fact it was not (R. 9-10, 31-32). All of these misstatements are equally applicable to and equally vitiated the conviction on Count One, the conspiracy count (R. 11-13, 32-33, *supra*, p. 6). Further, as respects Count One, the district court of appeal's untrue assumption—that the Grand Jury testimony furnished petitioner apprised him of the particulars of the conspiracy and the names of its victims—precluded petitioner from showing that the indictment and pre-trial proceedings, considered in their totality, denied him due process and equal protection in failing to inform him of the basis of the conspiracy count, thus denying him opportunity of preparing his defense (R. 15-19, 53-54).

The palpable and patent misstatements of facts by the district court of appeal, whereby evidence excluded as to petitioner was applied to him, the record stated to contain testimony which in fact it did not, testimony given by one was attributed to another, testimony not corroborated was misstated to have been corroborated, and the untrue assumption indulged that petitioner had been apprised of the conspiracy count in such manner as to satisfy due process, denied petitioner the benefit of important favorable California rules, the opportunity of showing deprivation of due process, and a hearing in the California Supreme Court [7] by virtue of its rule that it will not go behind the statement of facts in an opinion of a district court of appeal if the opinion contains a correct statement of the law based upon the facts stated therein [8] (R. 10-11). It is therefore submitted that the California proceedings, considered in their totality, denied appeal in violation of the Four-

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[7] Petitioner's confinement having resulted from the district court of appeal's affirmance which was predicated on these misstatements, such misstatements, of themselves, would seem to have resulted in confinement in violation of the Fourteenth Amendment, especially since it is the law in California that a decision of an appellate court which is based on a misstatement or omission of material facts is a nullity (R. 28-29). We do not here have a case of mere error on appeal. However, petitioner emphasizes not only the misstatements but the ultimate results produced by their operation in *conjunction with* California appellate procedure.

[8] Although one of California's judges has said of this rule, "Since the adoption of the above-mentioned procedural policy, grave doubt has arisen in the minds of many members of the legal profession and I daresay of some of the members of this Court, as to whether such policy has not been the means of grave injustice being done to litigants in numerous cases because of the failure of some District Courts of Appeal to furnish a correct statement of facts in their opinions which come before this Court for review" (R. 11), it is not the rule *per se*, but its operation in a situation where, as here, the district court of appeal has made palpable and patent misstatements, that petitioner emphasizes as resulting in confinement in violation of the Fourteenth Amendment.

teenth Amendment. That such proceedings must be considered in their totality is clear:

> "Furthermore, since Arkansas provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of law under which the petitioners' convictions must stand or fall." *Cole* v. *Arkansas*, U. S. Supreme Court, March 8, 1948, 16 U. S. Law Week 4215, 4216.

The right of appeal, when integrated by a state into its legal process, cannot, consistently with the Fourteenth Amendment, be arbitrarily withheld from a particular defendant or unreasonably or discriminatively curtailed. *Cochran* v. *Kansas*, 316 U.S. 255; cf. *Boykin* v. *Huff*, 121 F. (2d) 865, 872 (App. D.C.).

"Equal protection of the laws" requires "that all persons. . . . should have like access to the courts of the country for the protection of their persons." *Barbier* v. *Connolly*, 113 U.S. 27, 31. Here, petitioner was accorded merely the form and not the substance of access to the district court of appeal, and by virtue of its palpable and patent misstatements, was entirely precluded from a hearing in the Supreme Court. This discrimination[9] denied him the equal protection of the laws.[10]

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[9] To establish the discrimination, it is not necessary for petitioner to show that others were given what he was denied because, in the absence of proof to the contrary, it is presumed that the laws of the state are properly administered. *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 190.

[10] As was said in petitioner's brief in *Cochran* v. *Kansas, supra*, it "seems unnecessary to seek to fit the discrimination here alleged precisely into any of the categories recognized in the cases. Whether their discriminatory acts be deemed 'invidious', *Soon Hing* v. *Crowley*, 113 U. S. 703, 708 (1885), or 'unjust and illegal', *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1866), or 'intentional and arbitrary', *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 352 (1918)" (p. 26), the final result was to deny petitioner the substance of his right of appeal.

Further, the arbitrary deprivation, as here, of the substance of the right of appeal denies due process. See *State* v. *Guerringer*, 265 Mo. 408, 416-417, 178 S.W. 65, 67; *Wuest* v. *Wuest, supra; Ex Parte Sharp*, 33 Fed. Supp. 464 (D.C. Kansas).

That severe prejudice resulted to petitioner from the discriminatory denial of the substance of appeal is clear: such denial deprived petitioner of the benefits of the California rules that evidence which has been excluded as to a particular defendant cannot be considered against him (R. 7, 29-30), that no person can be convicted of the crime of defrauding by means of a false pretense unless there is corroboration, and that such crime cannot be predicated upon an alleged misrepresentation not testified to by the victim [11] (R. 31-32). Moreover, the discriminatory denial of appeal prevented petitioner from establishing the violation of the Fourteenth Amendment which resulted from inadequate information respecting the conspiracy charge [12] (R. 15-19, 49-54).

Such discriminatory denial of appeal violates the Fourteenth Amendment. The fact that the discrimination was perhaps effected subtly, rather than grossly as in *Cochran* v. *Kansas*, 316 U.S. 255, renders an appeal to the Constitution of the United States neither less cogent nor less worthy. In fact, the subtler the discrimination, the more potentially significant its entrenchment on the Constitu-

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[11] It seems clear that these rules might well have been of controlling importance. It is to be remembered that the right of appeal was denied in respect of all eight counts. See *supra*, pp. 5-6, 9.

[12] "We further hold that failure to afford the petitioner a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; * * *." *In re Oliver*, U. S. Supreme Court, March 8, 1948, 16 U. S. Law Week 4240, 4244.

tion. Gross discrimination, like overt attack, generates its own repression, but subtle discrimination, like "boring from within", necessitates acute perception and constant alertness by the guardians of liberty.

Nor, it is respectfully submitted, is this an instance where abstinence is dictated by this Court's proper appreciation of the delicate nature of its supervision under the Fourteenth Amendment of the states' judicial processes. There is no attempt by this petition to inhibit the courts of a state in their free choice of state law, nor in those reasoning processes by which varying conclusions may be drawn from given facts. Rather, this is an instance of palpable, patent, and demonstrable *misstatements* of facts, which misstatements would be proved by measuring the *written words of the trial transcript* against the *written opinion* of the district court of appeal.[13]

CONCLUSION

Wherefore it is respectfully requested that this petition for a writ of certiorari to the Supreme Court of the State of California be granted.

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March, 1948.

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[13] It is of course clear that the right of appeal as here denied could not have been vindicated in the very proceeding in which it was wrongfully denied; necessarily, it must be vindicated in a collateral attack, here, habeas corpus. Cf. *Cochran* v. *Kansas*, 316 U. S. 255.

APPENDIX

California Constitutional Provisions.

Article VI, Section 4:

> The Supreme Court shall have appellate jurisdiction on appeal from the Superior Courts in all cases in equity, except such as arise in Municipal or Justices' Courts; also, in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine; also, in all such probate matters as may be provided by law; also, on questions of law alone, in all criminal cases where judgment of death has been rendered; *the said court shall also have appellate jurisdiction in all cases, matters and proceedings pending before a District Court of Appeal, which shall be ordered by the Supreme Court to be transferred to itself for hearing and decision, as hereinafter provided.* The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court or before any District Court of Appeal, or before any justice thereof, or before any Superior Court in the State, or before any judge thereof. (Italics added)

Article VI, Section 4b:

> The District Courts of Appeal shall have appellate jurisdiction on appeal from the Superior Courts (except in cases in which appellate jurisdiction is given to the Supreme Court) in all cases at law in which the Superior Courts are given original jurisdiction; also, in all cases of forcible or unlawful entry or detainer (except such as arise in Municipal, or in Justices' or other inferior courts); in proceedings in insolvency; in actions to prevent or abate a nuisance; in proceedings of mandamus, certiorari, prohibition, usurpation of office, removal from office, contesting elections, emi-

nent domain, and in such other special proceedings as may be provided by law; *also, on questions of law alone, in all criminal cases prosecuted by indictment or information,* except where judgment of death has been rendered.

The said Courts shall also have appellate jurisdiction in all cases, matters, and proceedings pending before the Supreme Court which shall be ordered by the Supreme Court to be transferred to a District Court of Appeal for hearing and decision. The said courts shall also have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of their appellate jurisdiction. Each of the Justices thereof shall have power to issue writs of habeas corpus to any part of his appellate district upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the District Court of Appeal of his district, or before any Superior Court within his district, or before any Judge thereof. (Italics added)

STATUTE.

PENAL CODE OF CALIFORNIA.

Section 1237:

An appeal may be taken by the defendant:

1. From a final judgment of conviction;

2. From an order denying a motion for a new trial;

3. From any order made after judgment, affecting the substantial rights of the party. (Enacted 1872.)